

Misfeasance, Nonfeasance, and the Self-Interested Attorney

C. D. Freedman

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Citation Information

Freedman, C. D. "Misfeasance, Nonfeasance, and the Self-Interested Attorney." *Osgoode Hall Law Journal* 48.3/4 (2010) : 457-498.
<http://digitalcommons.osgoode.yorku.ca/ohlj/vol48/iss3/3>

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Misfeasance, Nonfeasance, and the Self-Interested Attorney

Abstract

How extensive should the liability of an attorney acting under a "continuing power of attorney" be? Where the donor is capable, the question is not unduly complicated. However, where the donor is incapable and the attorney has an interest in the donor's estate, the question is more difficult. Attorneys acting on behalf of incapable donors should conduct themselves according to the highest standards of probity and fidelity in addition to performing their duties competently. Unexcused breach of the duty of care should result in compensation. For breach of fiduciary duty, restitution should be the norm rather than compensation. In the hardest cases, it is argued that an attorney with an interest in the donor's estate should not be allowed to profit from his or her wrong indirectly through his or her inheritance of the misappropriated assets.

Keywords

Lawyers--Malpractice; Conflict of interests; Power of attorney; Ontario. Substitute Decisions Act; Ontario

Misfeasance, Nonfeasance, and the Self-Interested Attorney

C.D. FREEDMAN *

How extensive should the liability of an attorney acting under a "continuing power of attorney" be? Where the donor is capable, the question is not unduly complicated. However, where the donor is incapable and the attorney has an interest in the donor's estate, the question is more difficult. Attorneys acting on behalf of incapable donors should conduct themselves according to the highest standards of probity and fidelity in addition to performing their duties competently. Unexcused breach of the duty of care should result in compensation. For breach of fiduciary duty, restitution should be the norm rather than compensation. In the hardest cases, it is argued that an attorney with an interest in the donor's estate should not be allowed to profit from his or her wrong indirectly through his or her inheritance of the misappropriated assets.

Dans quelle mesure un avocat qui intervient aux termes d'une « procuration perpétuelle relative aux biens » est-il responsable? Lorsque le donataire est capable, la question ne revêt aucune complication inutile. Toutefois, quand le donataire est incapable et l'avocat détient un intérêt dans la succession du donataire, la question s'avère plus ardue. Les avocats qui interviennent au nom de donataires incapables doivent se comporter conformément aux normes les plus exigeantes de probité et de fidélité, en plus de s'acquitter avec compétence de leurs devoirs. La violation non excusée du devoir de soin devrait aboutir à une compensation. En cas de violation du devoir fiduciaire, la restitution — plutôt que la compensation — devrait être la norme. Dans les cas les plus complexes, on argue qu'un avocat disposant d'un intérêt dans la succession du donataire ne devrait pas pouvoir profiter indirectement de ses fautes en héritant des biens mal acquis.

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* Faculty of Law, Queen's University, online: <<http://www.davidfreedman.ca>>. A previous version of this article was presented at the Law Society of Upper Canada's 13th Annual Estates and Trusts Summit.

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IN THIS ARTICLE, I consider the proper scope of an attorney's liability under a "continuing power of attorney for property" under the *Substitute Decisions Act*.¹ This statute has been in force for a number of years and has generated considerable jurisprudence. Unfortunately, I would suggest, the cases do not always disclose a structured inquiry into substitutive liability, and the provisions of the statute itself are sometimes problematic. This article examines structural issues as well as one problematic lacuna.

It has been suggested by an eminent jurist that the fiduciary obligations of an attorney acting on behalf of an incapable person² approach those of a trustee.³ With respect, I disagree. I would suggest that the obligations owed to an incapable person are *more extensive* than those of a trustee. Indeed, given changing social circumstances and evolving legal regimes, I suggest that attorneyship⁴ on behalf of an incapable donor has surpassed conventional trusteeship as the defining example of a fiduciary who must act according to the highest standards of competency, probity, and fidelity. In respect of conventional trusts, most beneficiaries are (or will become) able to enforce the trust and vindicate their entitlements at some point. It is safe to assume that only in the rarest cases will

1. S.O. 1992, c. 30 [*SDA*].

2. *Ibid.*, s. 6. I use "incapacity" throughout as defined by the *SDA*:

A person is incapable of managing property if the person is not able to understand information that is relevant to making a decision in the management of his or her property, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.

3. See *Richardson Estate v. Mew* (2009), 96 O.R. (3d) 65 at para. 48 (C.A.) [*Richardson Estate*], citing *Banton v. Banton* (1998), 164 D.L.R. (4th) 176 at para. 151 (Ont. Sup. Ct.) [*Banton*].

4. *SDA*, *supra* note 1, s. 38(1). I use "attorneyship" here to include court-appointed guardianship for property as well.

an incapable donor ever regain sufficient mental capacity to allow him or her to participate directly in enforcing the attorney's obligations. Protecting the dignity of such vulnerable people⁵ and safeguarding their interests against exploitation are social policies of "super-ordinate importance."⁶ Attorneyship is a vitally important legal institution in contemporary society, and the law must foster its proper operation; donors of such powers must have complete faith that the law will hold their attorneys to account for misconduct. Quite simply, if the law does not do so, continuing powers of attorney will become hollow devices.

It has recently been suggested that one of the unintended consequences of the *Substitute Decisions Act* is that it created a forum for "high conflict" families to fight with each other.⁷ I would add that another unanticipated consequence is the financial exploitation of older adults through manipulation of the substitute decision-making regime; indeed, this exploitation might properly be called a form of elder abuse. The law should respond with bright lines and effective remedies to deter misconduct and unnecessary litigation. At least as far back as Roman law,⁸ it has been recognized that no mature legal system allows for a wrong to go unremedied. English equity, of course, developed in part to cure the defects in the remedial response to legal wrongs and the inability of courts of law to administer justice effectively—hence, "equity will not suffer a wrong to be without a remedy." Indeed, the Court of Appeal for Ontario recently affirmed that "[e]quity is 'the soul and spirit of all law ... equity is synonymous with justice.'"⁹

5. See *Park v. Park*, [2010] O.J. No. 1840 at para. 47 (Sup. Ct. J.) (QL).

6. See *Re Phelan* (1999), 29 E.T.R. (2d) 82 at para. 23 (Ont. Sup. Ct.), per Kiteley J. who adopts the dicta of Dickson J. in *Nova Scotia (Attorney General) v. MacIntyre*, [1982] 1 S.C.R. 175.

7. Jan Goddard, "The Substitute Decisions Act: A Law of Unintended Consequences" *Law Society of Upper Canada's Special Lectures, 2010: A Medical-Legal Approach to Estate Planning, Decision-Making, and Dispute Resolution for the Older Client* (Toronto: Law Society of Upper Canada, 2010) at 2.

8. *Ubi jus ibi remedium* ("where there is a right, there is a remedy"). See e.g. *Great Western Railway v. Brown* (1879), 3 S.C.R. 159; *Norton v. Fulton* (1907), 39 S.C.R. 202; and *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3.

9. *Evans v. Gonder* (2010), 259 O.A.C. 295 at para. 21, quoting William Blackstone, *Commentaries on the Laws of England*, 2d ed. vol. II (Chicago: Callaghan & Co., 1879) at 429.

I suggest that a court of equitable jurisdiction is armed with all the tools necessary to ensure a wrongdoer does not profit from his or her wrongdoing where he or she breaches fiduciary obligations owed to an incapable donor under an attorneyship. Where the attorney breaches the duty of care, compensation should be the norm. Where the attorney breaches his or her fiduciary duty, restitution should be the norm. The donor's interest should be fully restored and the attorney ought not be allowed to profit from his or her wrong. Further, in the very hardest of cases, where the attorney is self-interested in the incapable donor's estate, I assert that courts may properly order a proprietary remedy to disturb testamentary entitlements so as to favour innocent heirs. "Equity is not past the age of child-bearing,"¹⁰ to use a familiar phrase, and we should respond robustly to grossly offensive conduct such as the financial exploitation of people made especially vulnerable due to mental incapacity.

I. POWERS OF ATTORNEY WHERE THE DONOR REMAINS CAPABLE: AGENCY

Historically, a power of attorney has been a device that has been regulated through a combination of legal and equitable doctrines. As an agent, the attorney, like any agent, must carry out the donor's instructions and exercise such care and skill in the performance of his or her duties as is necessary for the proper conduct of the business undertaken.¹¹ If the provisions do not allow for a power to be exercised, the attorney, quite simply, has no business attempting to exercise it. If the terms of the power do allow for its exercise, the attorney is liable to compensate for any loss that arises in consequence of its misuse. It is a simple model that the *Substitute Decisions Act* extends to incapable donors. In respect of capable donors, however, I would suggest that the law remains, and should remain, unaffected by the statute's provisions.

10. *Eves v. Eves*, [1975] 3 All E.R. 768 at 771 (C.A.). The phrase was attributed to Harman J. by Lord Evershed. See Sir Raymond Evershed, "Equity is Not to be Presumed to be Past the Age of Child-Bearing" (1953) 1 Sydney L. Rev. 1 at 4.

11. See e.g. *Wolsely Tool & Motor Car Co. v. Jackson, Potts & Co.* (1915), 33 O.L.R. 96 (H.C.), aff'd (1915), 33 O.L.R. 587 (C.A.); *Tabata v. McWilliams* (1981), 33 O.R. (2d) 32 (H.C.), aff'd (1982), 40 O.R. (2d) 158 (C.A.).

A. "ATTORNEY" AND "POWERS OF ATTORNEY"

In English law, the genesis of "attorney" as a legal term is somewhat obscure. The origin of the word itself lay in the French *atorne*, the past participle of *atourner*, meaning "to turn to." With the Norman Conquest, such terms migrated across La Manche.¹² The concept of agency—authorized representation sufficient to bind the principal—entered English law from a combination of Anglo-Saxon law, early Germanic law, and elements of canon and continental law that made their way into England after the Conquest. All of these came together to recognize isolated forms of binding representation in some circumstances, such as allowing the agent to borrow on behalf of the Crown and binding the lender and borrower to each other. By the thirteenth century, it was clear that there were two facets to legally recognized representation: that relating to rights of representation and audience before some courts (through the doctrine of *attornatus*, whereby a litigant, the *attornans*, could appoint another person to represent him in the litigation¹³ and be bound by his representative's actions to the satisfaction of his opponent)¹⁴ and that relating to representation as a more conventional commercial agent.¹⁵

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12. Otherwise referred to as the English Channel. As one might expect, there is a rich history on the evolution of English legal language. See e.g. George E. Woodbine, "The Language of English Law" (1943) 18 *Speculum* 395; Roger Dahood, "Hugh de Morville, William of Canterbury, and Anecdotal Evidence for English Language History" (1994) 69 *Speculum* 40.
 13. See Sir John Comyns & Stewart Kyd, *A Digest of the Laws of England*, 4th ed. (Dublin: Luke White, 1793) at 618; George E. Woodbine, ed., *Glanvill, De Legibus et Consuetudinibus Regni Angliae* (New Haven: Yale University Press, 1932). The term continued in use, to decreasing extent, until it was formally abolished in England and Wales through the reforms under the *Supreme Court of Judicature Act, 1875* (U.K.), 38 & 39 Vict., c. 77 [SCJA]. "Attorney at law" is of course still used in the United States.
 14. See e.g. Frederick Pollock & F.W. Maitland, *The History of English Law*, 2d ed. vol. I (Cambridge, U.K.: Cambridge University Press, 1952) at 228-29; Wolfram Müller-Freienfels, "Legal Relations in the Law of Agency: Power of Agency and Commercial Certainty" (1964) 13 *Am. J. Comp. L.* 193 at 195; and Heinrich Brunner, "Early History of the Attorney in English Law" (1908) 3 *Ill. L. Rev.* 257 at 261-66.
 15. One might also distinguish "attorney" from the feudal ceremony of "attornment" wherein the feudal tenant would agree to be bound to the new lord in succession. Attornment still features as a legal term. An "Attornment and Non-Disturbance Agreement" addresses the priority of the rights of tenants and lenders. It deals with how and when the rights of tenants will be subordinate to the rights of lenders or, sometimes, at the lender's option, senior to the rights of lenders. See *Goodyear Canada Inc. v. Burnhamthorpe Square Inc.* (1998), 41 O.R. (3d) 321 at para. 6 (C.A.).

Indeed this was the meaning of *atourne* as used in what is considered to be the very first authority on English law written after the Norman Conquest, which was, appropriately enough, written in French.¹⁶

These were early and crude forms of agency that operated in quite narrow circumstances. Over time, and with the evolution of a mercantile economy in England, agency became a commercial necessity in such matters as brokerage, shipping, sale of goods, and employment. One cannot imagine a sophisticated economy being able to function without agents with authority to bind their principals. Hence the law developed fairly briskly in the industrial age for quite pragmatic reasons. The twofold legal treatment of agents was consistent with the division of legal and equitable doctrines and with the differing jurisdictions of courts of law and equity. While the common law courts tended to be concerned with the sufficiency of the appointment to bind third parties and with the enforcement of the agreement between the principal and the agent as a matter of contract law, equity became involved where its *in personam* jurisdiction was necessary in order to make the attorney account for his or her actions and where the agent breached his or her fiduciary obligations.

As a matter of common law, a “power of attorney” (in older usage, a “letter of attorney”) itself had no special meaning as a precise term of art to be accorded any sort of special or *sui generis* treatment.¹⁷ Rather, it was a species of contract and was enforced in the normal way with co-existent fiduciary obligations. As has been pointed out by others, a power of attorney gives rise somewhat unconventionally to enforceable contractual obligations as a matter of principle.¹⁸ That

To examine the colloquial use of attornment in respect of jurisdiction, see *e.g.* *R. v. Young*, [2010] O.J. No. 1991 (QL) (Ct. J.); *R. v. Mitchell* (2001), 51 W.C.B. (2d) 461 (Ont. Sup. Ct.).

16. See Francis Morgan Nichols, *Britton: The French Text Carefully Revised with an English Translation, Introduction and Notes*, vol. 1 (Oxford: Clarendon Press, 1865).
17. Of course statutes might have dealt with formalities and with the sufficiency of a sealed instrument for certain transactions. See *e.g.* *An Act to Amend the Law of Property and Trusts in Upper Canada*, S.Prov.C. 1865, c. 28, ss. 23-24; *An Act to amend the Law of Property in Ontario*, R.S.O. 1877, c. 95, ss. 14-15.
18. See *e.g.* M. Jasmine Sweatman, *Guide to Powers of Attorney* (Aurora: Canada Law Book, 2002) at 4-5; Kate Misurka, “Powers of Attorney: A Corporate and Commercial Application” (2006) 26 E.T.P.J. 1 at 2; and Carmen S. Thériault, “Powers of Attorney—Some Fundamental Issues” (1999) 18 E.T.P.J. 227 at 228. See also *Chantenay v. Brazilian Submarine Telegraph*, [1891] 1 Q.B. 79 (C.A.(U.K.)); *Daily Telegraph Newspaper Company Ltd. v. McLaughlin*, [1904] A.C. 776 at 780 (P.C.) [*Daily Telegraph*], aff’ing (1904), 1 C.L.R. 243 (H.C.A.); and *Demars v. Chevron Standard Ltd.* (1992), 83 Man. R. (2d) 58 (C.A.).

is to say, its terms may be enforceable notwithstanding that it is set up in circumstances that do not necessarily feature consideration or that it is granted within a document made pursuant to some statute that would allow it to be enforced as a matter of law. However, this is not always the case. Certain transactions cannot be effected through a power of attorney granted gratuitously. Hence the older practice of using seals on powers of attorney—the seal sufficed for valuable consideration as a matter of common law (but not in equity) and allowed the document to be held sufficient to execute another document that was required to be sealed.¹⁹ With respect to the learned authors that have considered the matter of formalities, the point is rather tangential in most circumstances, given that the true question is whether the donor and donee of the power intended to enter into enforceable legal relations. Thus, even if there was an oral agreement obviously not under seal, the power was considered good, and the courts adopted a liberal construction of its terms in order to allow for its use in the conventions of the trade or business in question.²⁰ Even if the power was faulty and the agent acted on it, the court presumed the obligation was good and enforced it accordingly.²¹

In an era before the advent of detailed regulation in fundamental areas such as employment or specific forms of trade, both the common law and equity provided the necessary legal treatment of such powers of attorney in order to facilitate arrangements. In accordance with the nature and method of the common law, cases created a body of principles that could be predictably applied to sets of facts as they presented themselves. Thus, the power of attorney could be revoked (unless made irrevocable by the principal) by written instrument, oral statement,²² or act of the donor inconsistent with its continuing operation.²³ It terminated on performance,²⁴ and terms providing for its termination could be implied,²⁵

19. See *e.g. Steiglitz v. Egginton* (1815-1817), 171 E.R. 193 (Ct. Common Pleas); *Berkeley v. Hardy* (1826), 108 E.R. 132 (K.B.).

20. See *e.g. Entwisle v. Dent* (1848), 1 Exch. Rep. 812 (U.K.); *Pole v. Leask* (1860), 28 Beav. 562 (Rolls Ct.); *Davis v. Scottish Provincial Insurance Co.* (1865), 16 U.C.C.P. 176 (Upper Canada Ct. Common Pleas); and *Brassard v. Langevin* (1877), 1 S.C.R. 145.

21. See *School Trustees of Hamilton v. Neil* (1881), 28 Gr. 408 (Ont. Ch.).

22. See *e.g. Bromley v. Holland* (1802), 32 E.R. 2 (Ch.); *Warlow v. Harrison* (1859), 120 E.R. 925 (Exch.); *The Margaret Mitchell* (1858), 166 E.R. 1174 (H.C. Adm.); and *R. v. Wait* (1823), 130 E.R. 50 (Exch.).

23. See *Smith v. Jennings* (1605-1611), 145 E.R. 32 (Exch.).

24. See *Gillow and Co. v. Lord Aberdare* (1892), 9 T.L.R. 12 (C.A.).

but only when necessary.²⁶ Otherwise, the agent could assume that the power continued until bankruptcy of the donor²⁷ or the donee,²⁸ or until either of their deaths²⁹ (or it could pass to the personal representative of the donee if set up in that way).³⁰ Where appropriate, aspects of the agent's obligations under the power of attorney were fiduciary in character.³¹ For example, to avoid any abuse, a court of equity could interfere where the agent should have sought his principal's consent to enter into a transaction personally.³² In that situation, the court could make him a trustee for the principal as a result.³³ The policy was to make extensive liability available to redress deceit.³⁴ Then, as now, disputes arose over the duty to account based upon whether the power of attorney set up fiduciary obligations or not.³⁵

That the power could not survive incapacity is immediately apparent; a person incapable of contracting is incapable of acting as either a principal or agent,³⁶ with the law of contract determining the question of incapacity.

25. See *Hamlyn & Co. v. Wood & Co.*, [1891] 2 Q.B. 485 (C.A.).

26. See *Jenkins v. Gould* (1827), 38 E.R. 620 (Ch.).

27. See e.g. *Markwick v. Hardingham* (1880), 15 Ch. D. 339 (C.A.); *Alley v. Hotson* (1815), 4 Camp. 325 (K.B.(U.K)).

28. See *Bailey v. Thurston & Co., Ltd.*, [1903] 1 K.B. 137 (C.A.).

29. See e.g. *Adams v. Buckland*, [1705] 23 E.R. 929 (Ch.); *Jacques v. Worthington* (1859), 7 Gr. 192 (U.C. Ct. Ch.).

30. See *Foster v. Bates* (1843), 152 E.R. 1180 (Exch.).

31. Where "trust and confidence" was placed on the agent. See *Padwick v. Stanley* (1852), 68 E.R. 664 at 664 (Ch.).

32. See e.g. *Rothschild v. Brookman* (1831), 5 E.R. 273 (Ch.); *Harrison v. Harrison* (1868), 14 Gr. 586 (Upper Canada Ct. Ch.).

33. See e.g. *Lees v. Nuttall* (1834), 39 E.R. 1157 (Ch.); *Ross v. Scott* (1875), 22 Gr. 39 (Ont. Ch.).

34. See *Commercial Bank of Windsor v. Morrison* (1902), 32 S.C.R. 98.

35. See *Barry v. Stevens* (1862), 54 E.R. 1137 (Rolls Ct.) [*Barry*].

36. See *Daily Telegraph*, *supra* note 18. The question normally arose not in respect of the validity of the power in question, but rather in respect of whether an attorney or donor might be liable to a third party or upon a transaction with a third party. See e.g. *Blades v. Free, Executor of G W Clark* (1829), 109 E.R. 63 (K.B.); *Drew v. Nunn* (1879), 4 Q.B.D. 661 (C.A.(U.K.)); *Yonge v. Toynbee* (1909), [1910] 1 K.B. 215 (C.A.(U.K)). Cf. *Kerr v. Town of Petrolia* (1921), 51 O.L.R. 74 (H.C.); *Canada Permanent Trust Co. v. Parks* (1957), 8 D.L.R. (2d) 155 (N.B. C.A.).

B. AGENTS AND THE FIDUCIARY PRINCIPLE

It is important to note that the power of attorney as a form of agency continues to be important and may be made by commercial actors for wholly commercial dealings.³⁷ Such powers may involve the provisions of the *Powers of Attorney Act*³⁸ to effect certain transactions. When made by natural people rather than corporations, such powers of attorney are *capable* of continuing beyond the donor's later incapacity, at which time the *Substitute Decisions Act* is engaged and its provisions govern the exercise of such powers of attorney.³⁹ This point is important in respect of the application of the fiduciary principle to simple agency relationships set up by powers of attorney.

Equity, of course, does not normally supervise powers independently but rather supervises a person who owes certain types of personal obligations to another. In that context, equity might interfere with the exercise of the power in question. Equity's intervention in such cases, however, has more to do with the fact that the person holding the power is a fiduciary independent of the power than with the fact that the power has an independent fiduciary character.⁴⁰ Thus, for example, where a trustee holds a non-compellable discretionary power to appoint property, equity will not normally intervene unless there is a "fraud on a power,"⁴¹ that is, an exercise of power *mala fides*. Here, what concerns equity is not merely the act of exercising the power beyond its terms, but the fact that this is done intentionally,⁴² thus frustrating the intention of the donor in giving the power.⁴³

The exercise of a court's equitable jurisdiction is very different in regard to a power of attorney that sets up a simple agency than in regard to a power of appointment exercised by a trustee. With respect to the power of attorney, the court's jurisdiction is much narrower and is used to assist the donor in obtaining information from the attorney to ascertain whether an action should be brought

37. See Misurka, *supra* note 18.

38. R.S.O. 1990, c. P-20 [PAA].

39. *Supra* note 1, s. 7(6).

40. See Lionel Smith, "Understanding the Power" in William Swadling, ed., *The Quistclose Trust: Critical Essays* (Oxford: Hart, 2004) 67.

41. *Edell v. Sitzler* (2001), O.R. (3d) 198 at para. 164 (Sup. Ct.). See also *Fox v. Fox Estate* (1995), 28 O.R. (3d) 496 (C.A.); *Vatcher v. Paul*, [1915] A.C. 372 (P.C.).

42. See *Re Brooks' Settlement Trusts, Lloyds Bank Ltd. v. Tillard*, [1939] 3 All E.R. 920 (Ch.).

43. See generally *Schipper v. Guaranty Trust Co. of Canada* (1989), 69 O.R. (2d) 386 (C.A.).

for misuse of the power, which is answerable in damages in contract. One must remember that in England, common law courts were separate from the equitable courts prior to the 1875 reforms;⁴⁴ the common law courts had no *in personam* jurisdiction over the agent with the power to force him or her to account through injunction. However, equity judges could, in essence, compel the agent to account for his or her actions. This was particularly important at a time when the governing rules respecting discovery were less mature than they are today. The process is the same today, notwithstanding that courts of law and equity are fused and talk of equity has fallen to the wayside in general.

A complication arises, however, with respect to a confusion of terms. An agent is not necessarily a fiduciary in the sense that his or her principal placed trust in him or her and granted discretionary powers.⁴⁵ However, for a long time equity has regarded an agent as having an obligation to “account” to his or her principal and has used the fiduciary principle as a vehicle to compel the agent to respond to reasonable inquiries. This is not the same as an obligation to “pass accounts” as a fiduciary or to “account for profits” as a remedy for a wrong. The difference is that in one case, equity acts to compel an agent to respond to inquiries to ensure that no equitable fraud has taken place, and, in the other, equity recognizes that a wrong has been committed and requires a full statement of transactions before deciding upon remedial consequences. In both cases, however, equity compels the agent to explain at least some of his or her behaviour.

C. MAINTAINING A TRADITIONAL APPROACH TO AGENCY

This article suggests that agency for a capable principal and attorneyship for an incapable donor are very different and ought to be regarded and developed differently. Assume that an older adult gives a continuing power of attorney for property and remains capable until his or her death. Must the attorney-as-agent necessarily keep an account of all transactions as if he or she were acting for an incapable donor? I contend that the answer is clearly no. Are there circumstances in which the court can compel the agent to present detailed accounts? I would suggest the answer is clearly yes. In each case, however, it is conventional agency, not the statutory model of substitute decision making, that is the source of the court’s jurisdiction to compel the attorney to respond, and I would suggest further that the point is an important one.

44. *SCJA*, *supra* note 13.

45. See *Knoch Estate v. Jon Picken Ltd.* (1991), 4 O.R. (3d) 385 (C.A.).

An attorney for a capable donor is merely “a conduit whose role is to facilitate contractual relations between the principal and third parties, always acting within the terms of the appointment.”⁴⁶ In a simple case—and assuming that the attorney actually acted under the power—the question is only whether the donor of the power approved the actions properly in the power itself or later ratified them by words or conduct, as opposed to whether the attorney acted “faithfully” or otherwise discharged more extensive fiduciary obligations.⁴⁷ The donor always retains the ability to discharge the attorney through a new instrument or through revocation of the existing instrument.⁴⁸ Thus, in *Fair v. Campbell Estate*, Justice Langdon held:

If the grantor is *sui juris*, he makes the decisions. He is not obliged to involve the attorney in all or any of them. He is not obliged to ask the attorney to help him to implement all or any of his decisions. Where the grantor is *sui juris*, imposition of a duty to account can cast an impossible burden on the attorney. He could be required to account for decisions over which he had no influence and for transactions that he did not implement in whole or in part.⁴⁹

This is a very orthodox approach.⁵⁰

I suggest that the authority of the court to compel an attorney for a capable donor to account is not within the scope of the *Substitute Decisions Act*. This authority arises under the ancillary jurisdiction of equity exercised in aid of contract, whereas the statute governs the exercise of powers flowing from a continuing power of attorney or “guardianship” where the donor is incapable. In a number of cases in recent years, however, courts have been confronted with the question

46. *Sworik v. Ware* (2005), 18 E.T.R. (3d) 132 at para. 93 (Ont. Sup. Ct.). See also *Banton*, *supra* note 3 at para. 151; *Richardson Estate*, *supra* note 3. The decision in *Banton* was approved by the Court of Appeal for Ontario in *Richardson Estate*: “An attorney for a donor who has mental capacity to deal with property is merely an agent” (at para. 48). See also *Miksche Estate v. Miksche* (2009), 97 O.R. (3d) 641 at para. 64 (Sup. Ct.).

47. See e.g. *Koperniak v. Wojtowicz* (2010), 57 E.T.R. (3d) 234 (Ont. Sup. Ct.); *Re Coupland Estate* (2005), 25 E.T.R. (3d) 1 (Ont. Sup. Ct.), *aff’d McDonald v. Coupland Estate* (2006), 25 E.T.R. (3d) 5 (Ont. C.A.).

48. See *Cusinato v. Cusinato* (24 November 2009) Toronto CV-09-13537 (Sup. Ct.) (WL), *aff’d* on other grounds (8 April 2010) Toronto CA C51222 (WL).

49. (2002), 3 E.T.R. (3d) 67 at paras. 29-30 (Ont. Sup. Ct.) [*Fair*]. See also *Harris v. Rudolph (Attorney for)* (2004), 10 E.T.R. (3d) 129 at para. 40 (Ont. Sup. Ct.) [*Harris*]; *Ekelshot-Kumelj v. Bradely*, [2011] O.J. No. 45 (Sup. Ct.) (QL).

50. See *Barry*, *supra* note 35.

of whether section 42 of the *Substitute Decisions Act* gives the court jurisdiction to order a passing of accounts where the donor was capable when the power was exercised. That provision reads:

42(1) The court may, on application, order that all or a specified part of the accounts of an attorney or guardian of property be passed.

(2) An attorney, the grantor or any of the persons listed in subsection (4) may apply to pass the attorney's accounts.⁵¹

It seems that an accounting in respect of the exercise of a power that might be drafted to survive incapacity (and thus bring itself within the statute) is intended to be available through this section, notwithstanding that the donor was in fact capable at the time the power was exercised.⁵² With respect, I would argue that there really is no need to complicate matters by bringing them within the purview of the statute and that there is every reason to leave the statute out of the analysis. The court, regardless of the statute, retains an equitable jurisdiction to assist the donor or his or her representative in order to avoid an equitable fraud being perpetrated through the power. In this way, the court may utilize its equitable jurisdiction to make an order without reliance on the statute. The important thing, then, is to identify a set of circumstances (say, where misappropriation was admitted⁵³ or where there was circumstantial evidence of unconscionable or wrongful conduct⁵⁴) to allow the court to exercise its equitable jurisdiction in a principled way and thereafter craft an appropriate order that responds to the circumstances of the dispute. Like in other areas, the court can control the disclosure of information to balance competing interests and obligations.⁵⁵

Consider the situation that arose in both *McAllister Estate v. Hudgin*⁵⁶ and *De Zorzi Estate v. Read*.⁵⁷ In both cases, to assist in the conduct of personal

51. *Supra* note 1, ss. 42(1)-(2).

52. See e.g. *Stickells Estate v. Fuller* (1998), 24 E.T.R. (2d) 25 at paras. 12-14 (Ont. Ct. J. (Gen. Div.)); *De Zorzi Estate v. Read* (2008), 38 E.T.R. (3d) 318 at para. 8 (Ont. Sup. Ct.) [*De Zorzi*].

53. See *Harris*, *supra* note 49 at para. 44.

54. See e.g. *Cornacchia v. Cornacchia* (2007), 154 A.C.W.S. (3d) 350 (Ont. Sup. Ct.); *Bishop v. Bishop* (2006), 151 A.C.W.S. (3d) 338 (Ont. Sup. Ct.), rev'd on other grounds (2007), 155 A.C.W.S. (3d) 743 (Ont. C.A.); *Fareed v. Wood* (2005), 140 A.W.C.S. (Ont. Sup. Ct.) [*Fareed*]; and *Mari v. DiPasquale*, [2000] O.J. No. 201 (Sup. Ct.) (QL).

55. This would demonstrate a preference for the court's equitable jurisdiction over competing theories to order a trustee to disclose information to a beneficiary. See *Schmidt v. Rosewood Trust Ltd.*, [2003] A.C. 709 (P.C.).

56. (2008), 43 E.T.R. (3d) 313 (Ont. Sup. Ct.) [*McAllister*].

57. *Supra* note 52.

business, an attorney acted on a power of attorney during the life of an incapable donor and opposed accounting to the estate trustee. In *McAllister*, beneficiaries of the estate pointed to suspicious circumstances wherein the estate trustee as attorney may have misappropriated the donor's assets. An accounting in the conventional sense was not ordered; rather, production of records sufficed.⁵⁸ In *De Zorzi*, the court went further and ordered a full passing of accounts, but the operative time frame for the accounting was only three months.⁵⁹ I would suggest that these cases are less about any real obligation to maintain accounts as might be said to be part of a duty of care and much more about the need for information to ascertain whether a claim ought to be brought against the attorney.⁶⁰

It is unnecessary in such cases to rely on the *Substitute Decisions Act* in preference to general equity, and there is a good reason not to do so. The attorney was an agent rather than a "substitute decision maker"—and agency and attorneyship are very different indeed.

D. ONE FURTHER POINT: THE FRAIL BUT CAPABLE DONOR

A capable donor is an autonomous actor. I have argued that a conventional power of attorney ought not to be regarded as a continuing power of attorney where the donor is capable, as the fundamental condition upon which the *Substitute Decisions Act* arises—incapacity—is missing. Two circumstances may arise that require clarification.

First, what of the attorney who continues to detrimentally use the non-continuing power of attorney after the donor's incapacity? I would suggest that it is not necessary to attempt to bring the attorney who acts on the now-

58. *McAllister*, *supra* note 56 at para. 16.

59. *De Zorzi*, *supra* note 52 at paras. 13-15.

60. See also *Roger Estate v. Leung* (2001), 105 A.C.W.S. (3d) 1166 (Ont. Sup. Ct.) (the attorney could be cross-examined to the same effect). In some circumstances, particularly where an action is brought alleging an independent wrong, the court may use the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 made pursuant to the *Courts of Justice Act*, R.S.O. 1990, c. C.43 to like effect. See *Kaunaite Estate v. Kazlauskas* (6 November 2009), Toronto 07-1312 (Sup. Ct.) (respecting Rule 51.06(1)(b)). See e.g. *Campbell v. Evert* (2009), 48 E.T.R. (3d) 304 (Ont. Sup. Ct.); *Ontario (Public Guardian & Trustee) v. Hawkins* (20 March 2009), Toronto 03-01109 (Sup. Ct.); and *Teffer v. Schaeffers* (2008), 93 O.R. (3d) 447 (Sup. Ct.) [*Teffer*] (as to the Public Guardian and Trustee seeking guardianship and an accounting thereafter).

terminated agency into the *Substitute Decisions Act* for supervision. Nor is it necessary to have little regard for the personal (as opposed to commercial) context and merely rely on the rules of contract and statute to determine rights and the scope of liability.⁶¹ An attorney who continues to act where the donor is incapable is not a substitute decision maker as contemplated by the statute because he or she is neither appointed under a continuing power of attorney nor appointed by the court as a guardian. Such a person is, however, a trustee—a trustee *de son tort*.⁶² In such cases, it is not that the attorney repudiates the relationship of agency and thus is regarded as a trustee,⁶³ but that he or she uses the now-terminated power of attorney to exercise dominion and control over the property.⁶⁴ While individuals who assume “custody and administration of property on behalf of others” are “sometimes referred to as constructive trustees,” they are “in fact, actual trustees.”⁶⁵ Thus, the attorney can be treated as a conventional trustee on well-settled principles without having to extend the statute in a manner that is both wrong and unnecessary.

Second, what of the frail donor who remains capable and who has given a general power of attorney with immediate effect? Should the law have regard for that person merely as a commercial actor, or would it be appropriate to bring supervision of the attorney within the *Substitute Decisions Act*? I would suggest, again, that the statute is not engaged, as the donor remains capable. However, the fact that the donor has capacity does not mean that equity cannot extend its jurisdiction to prevent the donor’s exploitation. On the one hand, it is important not to regard an agent as more in all cases; to repeat Justice Langdon’s *dicta*, “[i]f the grantor is sui juris, he makes the decisions and the agent carries them out.”⁶⁶ On the other hand, the presence of discretion in the exercise of a general

61. The *Powers of Attorney Act* preserves the ability to bind the principal to the attorney and to third parties, provided that the attorney “acted in good faith and without knowledge of the termination, revocation or invalidity.” *Supra* note 38, s. 3(1).

62. See e.g. *Barnes v. Addy* (1874), 9 L.R. Ch. App. 244; *Mara v. Browne*, [1896] 1 Ch. 199; *Air Canada v. M & L Travel Ltd.*, [1993] 3 S.C.R. 787 [*Air Canada*]; *Royal Bank of Canada v. Fogler, Rubinoff* (1991), 5 O.R. (3d) 734 (C.A.); and Paul Perrell, “Intermeddlers or Strangers to the Breach of Trust or Fiduciary Duty” (1999) 21 *Advocates’ Q.* 94.

63. See *Air Canada*, *ibid.* at para. 57, citing with approval Ruth Sullivan, “Strangers to the Trust” (1986) E. & T.Q. 217 at 246.

64. See Donovan W.M. Waters, Mark R. Gillen & Lionel D. Smith, eds., *Waters’ Law of Trusts in Canada*, 3d ed. (Toronto: Thomson Carswell, 2005) at 490-91.

65. *Taylor v. Davies* (1919), 51 D.L.R. 75 at para. 19 (P.C.).

66. *Fair*, *supra* note 49.

power of attorney, the possibility of influence over interests, and the frail donor's inherent vulnerability⁶⁷ are all consistent with a wider fiduciary duty than merely accounting for actions. As Justice Fletcher Moulton stated:

Fiduciary relations are of many different types; they extend from the relation of myself to an errand boy who is bound to bring me back my change up to the most intimate and confidential relations which can possibly exist between one party and another where the one is wholly in the hands of the other because of his infinite trust in him. All these are cases of fiduciary relations, and the Courts have again and again, in cases where there has been a fiduciary relation, interfered and set aside acts which, between persons in a wholly independent position, would have been perfectly valid. Thereupon in some minds there arises the idea that if there is any fiduciary relation whatever any of these types of interference is warranted by it. They conclude that every kind of fiduciary relation justifies every kind of interference. Of course that is absurd. The nature of the fiduciary relation must be such that it justifies the interference. There is no class of case in which one ought more carefully to bear in mind the facts of the case, when one reads the judgment of the Court on those facts, than cases which relate to fiduciary and confidential relations and the action of the Court with regard to them.⁶⁸

Thus, in such circumstances, it is not that the statute is necessary for equity to take jurisdiction over the attorney, but rather it is equity's own doctrines that recognize a differential fiduciary obligation that arises functionally and contextually in response to the vulnerability of the donor. This, of course, is not an automatic consequence of the fact that the donor is frail, but rather of his or her exploitation. As such, it is a high bar to liability. Thus, an attorney for a frail but otherwise capable donor does not necessarily incur wide-ranging fiduciary obligations, but it is possible to recognize such obligations in appropriate circumstances.

II. POWERS OF ATTORNEY WHERE THE DONOR IS INCAPABLE: ATTORNEYSHIP

In Ontario, as elsewhere, the inadequacy of the traditional power of attorney regime for use by individuals to manage ongoing personal care and property management has led to sophisticated substitute decision making regimes that can survive mental incapacity.

67. See *Hodgkinson v. Simms*, [1994] 3 S.C.R. 177 [*Hodgkinson*].

68. *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574 at para. 185 [*Lac Minerals*], citing *In re Coomber*, [1911] 1 Ch. 174.

The United States led the way.⁶⁹ In 1950, President Truman ordered the Federal Security Agency to hold a national conference on aging. In 1954, the state of Virginia legislated that powers of attorney could survive incapacity.⁷⁰ In 1961, the White House Conference on Aging recommended that social agencies, legal aid and bar associations, and the medical profession study ways to facilitate the provision of protective services to older people.⁷¹ That same year, the American Bar Foundation released its report *The Mentally Disabled and the Law*.⁷² In 1963, the American National Council on Aging, Guardianship and Protective Services for Older Adults produced a report dealing with questions of mental capacity and financial management.⁷³ The American Law Institute included durable power of attorney provisions in its 1969 *Uniform Probate Code*.⁷⁴ The English Law Commission began to look at the matter in the mid-1960s and released a working paper on the subject in 1967 and a final report in 1970.⁷⁵ The Law Reform Commission of Ontario released its own *Report on Powers of Attorney* in 1972,⁷⁶ recommending that the law take greater account of mental incapacity in powers of attorney. The process of legislative reform began thereafter in Ontario and eventually produced the *Substitute Decisions Act* in 1992.⁷⁷ Nineteen years on, substitute decision making comes to mind before commercial agency when one speaks of powers of attorney.

69. See generally Karen E. Boxx, "The Durable Power of Attorney's Place in the Family of Fiduciary Relationships" (2001) 36 Ga. L. Rev. 1.

70. Va. Code Ann. § 11-9.1 (original version at ch. 486 (1954)).

71. See e.g. Clark Tibbets, "The 1961 White House Conference on Aging: Its Rationale, Objectives, and Procedures" (1960) 8 J. Am. Geriatr. Soc. 373; Dale Vinyard, "White House Conferences and the Aged" (1979) 59 Social Services Review 655.

72. Frank T. Lindman & Donald C. McIntyre, *The Mentally Disabled and the Law* (Chicago: University of Chicago Press, 1961). See Ralph Slovenko & William C. Super, "The Mentally Disabled, the Law, and the Report of the American Bar Foundation" (1961) 47 Va. L. Rev. 1366.

73. See Virginia Lehmann & Geneva Mathiasen, *Guardianship and Protective Services for Older People* (New York: National Council on Aging Press, 1963).

74. § 5-501-505, 8 U.L.A. 418-424 (1969). See also David M. English, "The UPC and the New Durable Powers" (1992) 27:2 Real Prop. Prob. & Tr. J. 333.

75. See U.K., The Law Commission, *Powers of Attorney* (Working Paper No. 11) (London: Her Majesty's Stationery Office, 1967). The final report was presented in 1970. See U.K., The Law Commission, *Powers of Attorney* (London: Her Majesty's Stationery Office, 1970). The British legislation started its own development the following year with amendments to the governing power of attorney statute.

76. Ontario Law Reform Commission, *Report on Powers of Attorney* (Toronto: Department of Justice, 1972).

77. See e.g. Goddard, *supra* note 7 at 2-5; Sweatman, *supra* note 18 at 23-46.

The *Substitute Decisions Act* provides:

32(1) A guardian of property is a fiduciary whose powers and duties shall be exercised and performed diligently, with honesty and integrity and in good faith, for the incapable person's benefit.

...

(7) A guardian who does not receive compensation for managing the property shall exercise the degree of care, diligence and skill that a person of ordinary prudence would exercise in the conduct of his or her own affairs.

(8) A guardian who receives compensation for managing the property shall exercise the degree of care, diligence and skill that a person in the business of managing the property of others is required to exercise.

...

33(2) If the court is satisfied that a guardian of property who has committed a breach of duty has nevertheless acted honestly, reasonably and diligently, it may relieve the guardian from all or part of the liability.⁷⁸

The entire substitute decision making statutory scheme is predicated on the principle that individuals are presumed capable of making their own decisions respecting their property⁷⁹ and personal care.⁸⁰ Where a person is incapable, a substitute decision maker has authority if previously appointed by the incapable person in a suitable power of attorney or if appointed by the court. Alternatively, the Public Guardian and Trustee may have statutory authority to make decisions.⁸¹ Without any doubt, conceptually or by operation of the statute, an attorney acting pursuant to a continuing power of attorney for an incapable donor is a fiduciary.

Sections 31-42 of part I of the statute form a complete statutory scheme for the management of the incapable person's property. The fact that the statute precludes the application of the *Trustee Act*⁸² is not a reflection of any legislative intention that an attorney's obligations should be regarded as less than those of a trustee. Rather, it reflects an intention that the rules developed in respect of

78. *Supra* note 1, ss. 32(1), 32(7)-(8), 33(2).

79. *Ibid.*, s. 2(1).

80. See *Health Care Consent Act*, S.O. 1996, c. 2, s. 4(2).

81. Obviously there are practical distinctions between the offices of attorney and guardian (for example, in regard to the posting of security). See e.g. *SDA*, *supra* note 1, ss. 24(3)-(4), 25(1) (provides for the posting of a bond by guardians but not attorneys). See *Sundell v. Donyluk*, [2010] O.J. No. 4218 (Sup. Ct.) (QL) (where the bond was not required).

82. R.S.O. 1990, c. T.23, s. 35 [*Trustee Act*].

conventional trusts be inapplicable to this particular context, notwithstanding that the basic model of law is the same.⁸³ Hence, the *Substitute Decisions Act* has its own provisions respecting the exercise of the attorney's powers that create obligations unlike those of a trustee: a conventional trustee need not consult with the beneficiary and/or his or her family and friends in making decisions,⁸⁴ have regard to the beneficiary's will,⁸⁵ or give gifts or make loans to the beneficiary's family or friends of property that the beneficiary has an interest in.⁸⁶ It would be a breach of trust to do any of these. The attorney has more than obligations of investment and distribution to the donor of the power. As a substitute for the principal decision maker, the attorney must make decisions with the same degree of self-interest (or generosity) that the donor might reasonably display. Moreover, these are powers and duties that "shall be exercised and performed diligently, with honesty and integrity and in good faith, for the incapable person's benefit"⁸⁷—the obligations of the attorney thus *exceed* those of the trustee of a conventionally settled trust.

Notwithstanding that the content of the attorney's obligations are different, I would suggest that the trust comparison is apposite in respect of how the law supervises the attorney or guardian—for example, how he or she may retire,⁸⁸ pass accounts,⁸⁹ and take compensation.⁹⁰ The rules under the statute differ from a conventional trust in application to context but not in concept. Thus, the best way to conceive of the established model is as a sort of elevated trust, but again, where the attorney's obligations exceed those of a trustee. Thus, whether the obligation arises from the donor's autonomous act or the court's appointment of a guardian,⁹¹ the attorney has a set of obligations that have to be exercised exclusively in favour of a beneficiary with a life interest in the property (the donor).

83. *SDA*, *supra* note 1, s. 32(12).

84. *Ibid.*, s. 32(5).

85. *Ibid.*, s. 35.1. See *Champion v. Guibord*, [2007] 155 A.C.W.S. (3d) 982 (Ont. C.A.).

86. *SDA*, *ibid.*, s. 37.

87. *Ibid.*, s. 32(1).

88. *Ibid.*, ss. 11, 69.

89. *Ibid.*, s. 42.

90. *Ibid.*, s. 40.

91. *Ibid.*, s. 32(9). I have omitted statutory guardianship purposefully, given that this form of guardianship is merely an administrative process that does not necessitate dissimilar treatment in respect of the duty or standard of care owed to the incapable person.

Additionally, he or she has an obligation to preserve such assets as are available for those enjoying a remainder interest (those interested in the donor's estate, be they creditors or heirs). The continuing power of attorney granted by the donor or the guardianship ordered by the court organizes rights and liabilities much like a conventional trust settlement.

Seen in this way, the model of attorneyship set up under the statute provides for a conventional structure of rights and obligations, compels personal performance, and draws a useful distinction between the attorney's duty of care (to exercise the "care, diligence and skill that a person of ordinary prudence would exercise in the conduct of his or her own affairs") and the attorney's fiduciary obligation (to act "with honesty and integrity and in good faith").⁹² Thereafter, substantive liability is more easily predictable, notwithstanding that the remedial response to a breach may still pose difficulties.

A. THE DUTY OF CARE

It is trite law that duties of care can arise by statute, agreement, or special relationship between parties. It is equally trite law that a breach of a duty of care is actionable negligence where loss occurs. Obviously, then, a duty of care is a legal concept that works to ensure competent performance of obligations. Without restating basic propositions, it is worthwhile to recall the difference between duties of care and fiduciary obligations.

A duty of care is axiomatically different from a fiduciary duty, and it is critical to maintain that substantive distinction in respect of both the appropriate scope of substantive liability and the remedial consequences of a finding of liability. Liability for a breach of a duty of care may be excused; a breach of a fiduciary duty is not excusable. Liability for a breach of a duty of care leads to compensatory remedies; liability for a breach of a fiduciary duty may lead to restitutionary remedies. Under the conventional trusts doctrine, the trustee is not the insurer of the beneficiary's interest.⁹³ He or she must administer the trust competently, and the standard of care is the traditional standard of "ordinary prudence."⁹⁴ That

92. *Ibid.*, ss. 32(1), (8).

93. See e.g. *Bristol & West Building Society v. Mothew*, [1996] 4 All E.R. 698 (C.A.); *Armitage v. Nurse*, [1997] 2 All E.R. 705 (C.A.) [*Armitage*]; and cf. *Strother v. 3464920 Canada Inc.*, [2007] S.C.R. 177 at paras. 157-58.

94. See e.g. *Fales v. Wohlleben Estate*, [1977] 2 S.C.R. 302 [*Fales*]; *Learoyd v. Whiteley* (1887), 12 A.C. 727 (H.L. (Eng.)).

this is axiomatically different from a fiduciary duty is apparent from the fact that the trustee will be forgiven for technical breaches of his or her duty of care where the trustee acts in accordance with the traditional requirements of honesty and reasonableness.⁹⁵ Unlike for a breach of a fiduciary duty, then, liability is not strict. One sees exactly the same concept in the *Substitute Decisions Act*, and it operates in the same way: the duty of care has a corresponding standard of conduct, and liability is tied to the ability of the attorney to seek the direction of the court⁹⁶ and, where he or she does not do so, plead the statutory attorney's defence.⁹⁷ The object of the exercise is to promote sound management of the incapable person's property, and hence there is a standard of care that is tied to competence and not perfection. If it were otherwise, attorneyship and trusteeship would both be hollow institutions as no rational person would ever accept appointment. I would suggest that a number of points can be made with respect to the duty of care and the requirement that the attorney be capable of performing to the statutory standard.

Obviously the law is intended to respect the autonomous choice of a donor to select his or her attorney. However, as in the case of selection of a guardian where no continuing power of attorney was made by the incapable person, there is concern for the integrity of the office of attorney itself. Only a suitable person should be allowed to remain in office, and so a guardianship application may be brought to terminate the continuing power of attorney.⁹⁸ It is vital that the person appointed as attorney or guardian is capable of discharging the duty of care.⁹⁹ This is most clear in those contested guardianship cases (which seem much too frequent) in which courts prefer one potential guardian over another, or they prefer a neutral guardian over warring kin on the basis that mere willingness to do the job is insufficient for appointment. One must be truly seized of the extensive nature of both the duty of care and fiduciary duties that are inherent in guardianship of another's property and must be willing and able to act in accordance with those obligations. Kinship or friendship is not enough to warrant

95. See e.g. *Trustee Act*, *supra* note 82; *Re Stuart*, [1897] 2 Ch. 583; *Re Grindley*, [1898] 2 Ch. 593 at 601 (C.A.); and *National Trustees Co. of Australasia Ltd. v. General Finance Co. of Australasia Ltd.*, [1905] A.C. 373 at 381 (P.C.).

96. *SDA*, *supra* note 1, s. 39(1).

97. *Ibid.*, s. 33 (2).

98. *Ibid.*, s.12 (1)(c).

99. See generally *Abrams v. Abrams* (2010), 54 E.T.R. (3d) 283 (Ont. Sup. Ct.).

being trusted to discharge the obligations competently, whether the obligation arose from a power of attorney, statutory guardianship, or court-appointed guardianship. In such cases, a neutral actor—for example, the Public Guardian and Trustee¹⁰⁰ or a corporate guardian¹⁰¹—might be best. However appointed, and despite any dislike for anyone with whom they must work,¹⁰² attorneys and guardians must accept that their obligations are owed to the donor, that they will not be easily removed or discharged from office,¹⁰³ and that they will be held accountable both substantively and in costs¹⁰⁴ for acts that do not meet the statutory duty of care.

Second, the model clearly speaks to positive obligations that are not merely discretionary, non-compellable powers set up in a commercial power of attorney. These obligations go much farther than any conventional trusteeship predicated upon the principal obligations of investment and appointment within the terms of the settlement.

Third, the nature of the duty of care as distinct from fiduciary duties remains in place. For example, consider the position of a co-attorney who performs to the relevant standard of care, but a breach arises, and loss is occasioned due to the negligent conduct of a co-attorney: liability is the same under the *Substitute Decisions Act*¹⁰⁵ as under the applicable standard of care for trustees.¹⁰⁶ In neither case is the innocent party held accountable for the wrong of another as a matter

100. See e.g. *Waffle (Public Guardian and Trustee of) v. Duggan* (1999), 121 O.A.C. 294; *Bennett v. Gotlibowicz* (2008), 176 A.C.W.S. (3d) 533 (Ont. Sup. Ct.) [*Bennett*]. See also *Lazaroff v. Lazaroff* (2005), 23 E.T.R. (3d) 75 at para. 31 (Ont. Sup. Ct.). In *Lazaroff*, Corbett J. commented that the Public Guardian and Trustee is not “a guardian *comme les autres*.”

101. See *Chu v. Chang*, [2010] O.J. No. 1204 (Sup. Ct.) (QL) [*Chu*].

102. See *Martin v. Beriault* (2006), 144 A.C.W.S. (3d) 975 (Ont. Sup. Ct.). In this case, the court directed the warring kin, who accepted co-appointment under a power of attorney, to “bear their feelings of the other, work together inasmuch as their personalities will permit them so that the stated and unequivocal intention of [the donor] be honoured through the administration in her incompetency as she had made those appointments” (at para. 10).

103. See e.g. *Mullan v. Parr* (2009), 176 A.C.W.S. (3d) 577 (Ont. Sup. Ct.); *Teffer*, *supra* note 60; and *Bennett*, *supra* note 100.

104. See e.g. *Fiacco v. Lombardi* (2009), 82 C.P.C. (6th) 235 (Ont. Sup. Ct.) [*Fiacco*]; *Chu*, *supra* note 101; and *Bosch v. Bosch*, [2010] O.J. No. 854 (Sup. Ct.) (QL) [*Bosch*].

105. See *Shibley v. Shibley* (2004), 130 A.C.W.S. 334 (Ont. Sup. Ct.) [*Shibley*].

106. See *Fales*, *supra* note 94.

of duty of care. Moreover, a breach of the duty results in compensation.¹⁰⁷ While I will take up remedies below, it is nothing short of astounding to infer that the statute limits remedies for breach of fiduciary duty to compensation. Hence, compensation under section 33(1) is the norm for unexcused breach of a duty of care alone. All equitable remedies remain in place as against an attorney who breaches the fiduciary duties he or she owes to an incapable donor.

B. THE FIDUCIARY DUTY OF THE ATTORNEY

It is trite law that agents have some fiduciary obligations to their capable principals. As already discussed, in the context of a power of attorney these obligations are of a prophylactic nature: they seek to respond to the need to ensure that the agent has not acted outside the scope of the power or committed some equitable wrong. I would suggest that the *Substitute Decisions Act* makes much more extensive use of the fiduciary principle in regard to incapable donors of continuing powers of attorney and that these fiduciary obligations are *at least* as extensive as those of a trustee.

While I do not want to examine the foundations of the fiduciary principle in detail, I do wish to consider what sort of wrong is committed when a fiduciary obligation is breached and to argue that the breach is a species of equitable fraud.¹⁰⁸ Equity was, and remains, different from common law. Regarded as having developed as a protection against oppression and injustice, it provided relief against harsh laws, harsh application of law, and harsh results where the law was inadequate. The protection of the vulnerable was the hallmark of equitable jurisdiction. By at least 1615, the general jurisdiction in equity was recognized as being exercised to correct men's consciences for "frauds, breaches of trust, wrongs and oppressions of whatever nature."¹⁰⁹ One writer described this conception in this way:

The object of the Court of Chancery was, in the first instance, the purification of the defendant's conscience. It was a cathartic jurisdiction. If a person is allowed to remain in possession of property which it is against his conscience for him to retain, his conscience will be oppressed; and the court, out of tenderness for his conscience,

107. *SDA*, *supra* note 1, s. 33(1).

108. This approach differs from the usual approach, which involves asking whether a fiduciary obligation is owed in the circumstances of a given case. See *Hodgkinson*, *supra* note 67.

109. *The Earl of Oxford's Case* (1615), 21 E.R. 485 at 486 (Ch.) [spelling modernized]. The case also established that the common law prevails where there is a conflict—equity follows the law.

will deprive him, notwithstanding his resistance, of what is so heavy a burden upon it. This principle is at the very bottom of the doctrines of the court.¹¹⁰

To give effect to equity's mandate, the concept of "equitable fraud" developed, and it both pre-dates the common law jurisdiction and is a wider concept. Equitable fraud (or constructive fraud) allowed a court of equity to provide relief even against an act that was neither intended as dishonest nor committed recklessly. As Lord Chancellor Viscount Haldane said:

[I]t is a mistake to suppose that an actual intention to cheat must always be proved. A man may misconceive the extent of the obligation which a Court of Equity imposes on him. His fault is that he has violated, however innocently because of his ignorance, an obligation which he must be taken by the Court to have known, and his conduct has in that sense always been called fraudulent.¹¹¹

This concept of equitable fraud is rooted in a pragmatic view of equity as able to respond to an infinite variety of offensive acts¹¹² and has accordingly been left as a fluid rather than a rigidly defined doctrine as a matter of judicial policy. At the same time, equitable fraud is a doctrine bound up with some degree of fault. The difficulty is in assessing the degree of fault that is sufficient for an obligation to be constructed and a remedy provided in the circumstances of the case. This difficulty is compounded by the fact that equitable fraud is wider than legal fraud and, at least traditionally, relates to moral standards of conduct.¹¹³ Notwithstanding, the doctrine remains firmly part of Canadian law.¹¹⁴

The jurisdiction to avoid equitable fraud is given effect, in part, by the fiduciary principle. The term fiduciary comes from the nominative case (*fiducia*) of

110. Walter Ashburner, *Principles of Equity* (London: Butterworth & Co., 1902) at 51. See also William Gummow, "The Injunction in Aid of Legal Rights: An Australian Perspective" (1993) 56:3 Law & Contemp. Probs. 83 at 98-99.

111. *Nocton v. Lord Ashburton*, [1914] A.C. 932 at 954 (H.L. (Eng.)).

112. See *Reddaway v. Banham* (1896), [1895-99] All E.R. Rep. 133 at 145-46 (H.L. (Eng.)), where Lord Macnaghten stated, "[F]raud is infinite in variety. Sometimes it is audacious and unblushing; sometimes it pays a sort of homage to virtue, and then it is modest and retiring; it would be honesty itself if it could only afford it."

113. See L.A. Sheridan, *Fraud in Equity: A Study in English and Irish Law* (London: Pitman & Sons, 1957) at 188-89, 193-97.

114. See e.g. *Liverpool and London and Globe Insurance Co. v. Wyld* (1877), 1 S.C.R. 604; *Taylor v. Wallbridge* (1879), 2 S.C.R. 616; *Guerin v. R.*, [1984] 2 S.C.R. 335; *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534 [Canson]; *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6; and *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, [2002] 1 S.C.R. 678.

the Latin verb *fido* (trust).¹¹⁵ Once again, a historical reference helps to understand the importance of the concept: Fides was the Roman goddess of faith and trust who oversaw the moral integrity of Rome, and Roman law and its progeny placed great importance on duties that arose from good faith. So too did English equity, which was influenced by Roman law through canon law received in England after the Norman Conquest. Similarly, contemporary Canadian equity regards fiduciary duties as significant; discretion, influence over interests, and inherent vulnerability are the touchstones of such duties.¹¹⁶ Of course, not all arrangements that create fiduciary obligations make all obligations within that relationship fiduciary in character.¹¹⁷ Some care therefore must be taken in setting out the content of the fiduciary duty in question.

Given that section 32(1) of the *Substitute Decisions Act* deems the attorney of an incapable person to be a fiduciary, there is no doubt that he or she is one. Given the duties set out by the statute and the vulnerability of the incapable donor, I would suggest that the continuing attorney for property is a fiduciary of the highest order, even exceeding that of a conventionally situated trustee. Moreover, I would suggest that the fiduciary principle acts both to combat misfeasance and to mandate performance. Conceptually, this is to say that equity might alternately enjoin the attorney to avoid actual and apparent conflicts of interest and give up the fruits of any breach of that obligation¹¹⁸ (as in the case of a trustee or any other fiduciary),¹¹⁹ or it might specifically compel him or her to act on the obligation (and neither delegate nor remain inactive). As Justice Brown recently described the nature of the obligation, it is to act “motivated *solely* by a concern, *objectively-based*, for the best interests of the incapable person.”¹²⁰

Fiduciary obligations are important. Traditionally we have identified categories of relationships that give rise to such duties as well as functional criteria that assist in labelling certain obligations as fiduciary in character. This exercise

115. Canadian courts can be well-skilled in etymology. See *Girardet v. Crease & Co.* (1987), 11 B.C.L.R. (2d) 361 at 362 (S.C.).

116. See *Hodgkinson*, *supra* note 67; *Lac Minerals*, *supra* note 68.

117. See *Galambos v. Perez*, [2009] 3 S.C.R. 247.

118. For recent examples, see *Watson Estate v. Beatrice Watson-Acheson Foundation* (2010), 61 E.T.R. (2d) 234 at para. 18 (Ont. Sup. Ct.); *Zimmerman v. Fenwick* (2010), 103 O.R. (3d) 25 at paras. 88-90 (Sup. Ct.) [*Zimmerman*].

119. See *Bray v. Ford*, [1896] A.C. 44 (H.L. (Eng.)).

120. *Chu*, *supra* note 101 at para. 13 [emphasis in original].

speaks to the social significance of certain types of relationships and to the importance that we attach to the fulfilment of fiduciary obligations owed by one party to another. I would suggest that the breach of the attorney's fiduciary obligations owed to an incapable person is so grossly repugnant to social values that the law must respond robustly to deter such conduct.

It is important to draw a distinction, then, between acts of simple negligence (that is, breaches of the duty of care that are not excused) and breaches of fiduciary obligations (wrongs that are axiomatically different from negligence). As noted above, in the *Substitute Decisions Act*, liability for the former arises on a breach of the standard of care, diligence, and skill that a person of ordinary prudence would exercise in the conduct of his or her own affairs. Liability under the latter arises where the attorney fails to act honestly, with integrity, and in good faith for the incapable person's benefit. As with a trust, a single act can breach either standard or both. However, the nature of the wrong, the policy interest in responding to the wrong, and the remedial response are very different. Consider the pre-taking of compensation as compared to the misappropriation of funds subject to a fiduciary obligation. The former is a breach of the duty of care answerable in damages, whereas the latter is much more serious and gives rise to proprietary remedies where appropriate and, potentially, to criminal liability.¹²¹

III. THE REMEDIAL RESPONSE AND THE PROBLEM OF THE SELF-INTERESTED ATTORNEY

It is not my intention to survey all the possible bases for liability or all remedies that might arise in respect of the attorney's breach of the duty of care and/or fiduciary duties. In respect of the duty of care, the matter is rather straightforward and leads to compensation for loss. With respect to the fiduciary duties owed by an agent as trustee *de son tort*, by an agent with more extensive fiduciary obligations, and by both an attorney and guardian under the *Substitute Decisions Act*, the matter is more complicated and leads to restoration of the donor's interests and restitution of the fiduciary's gain. Here, the full panoply of remedies—from personal money awards as equitable compensation to an accounting of profits to proprietary remedies over assets into which the donor's interests can be traced—

121. See *Criminal Code*, R.S.C. 1985, c. C-46, s. 331 (theft by power of attorney).

becomes available. However, there remains a problem—that of the attorney with an interest in the donor's estate where the donor is either incapable or too frail to alter the status quo. Where appropriate, a court should use equitable remedies to disturb proprietary entitlements arising through testamentary instruments or through statute.

A. AGENCY: THE REMEDIAL GOAL IS COMPENSATION FOR LOSS

As I have argued above, powers of attorney have traditionally been treated by the common law as setting up agencies. It is trite law that the attorney is liable in damages for any loss occasioned from acting outside the terms of the power unless the act is ratified by the principal. The agent is liable for loss caused by his or her acts; the action is wholly governed by contract and the normal operation of the *Courts of Justice Act*¹²² in relation to interest payable on any money award.

It is equally trite law that the agent has a fiduciary obligation to respond to reasonable inquiries. Those inquiries may yield information upon which the agent might be made liable on some other basis in law or equity or both. For example, the agent may become a trustee *de son tort* for inter-meddling with the property of the principal, or the principal may be able to seek legal or equitable remedies as against a third party possessed of the principal's property. Again, this is wholly conventional.

Thus, in the simple case where an older adult gives a power of attorney to a family member to assist him or her in administering affairs, the agent has no special obligation to keep accounts in the manner of an attorney under a continuing power of attorney or a court-appointed guardian in respect of an incapable person or a trustee. I have argued that cases like *McAllister*¹²³ and *De Zorzi*¹²⁴ are best explained in terms of the narrow fiduciary duty to provide information to the principal, and, where necessary, the court may take charge of that process. There needs to be a balance between protecting the principal's rights and not exposing agents to onerous record-keeping obligations that were not contemplated as part of the arrangement. In the context of older adults, this also balances the interest in protecting vulnerable people with the interest in regarding older adults as fully autonomous actors, absent compelling circumstances to the contrary.

122. R.S.O. 1990, c. C-43 [CJA].

123. *Supra* note 56.

124. *Supra* note 52.

B. THE DUTY OF CARE UNDER THE *SUBSTITUTE DECISIONS ACT*: THE REMEDIAL GOAL IS COMPENSATION

Like any trustee, an incapable person's attorney or guardian who is found by the court to have mismanaged a donor's property is liable to compensate the donor for losses that flow from that breach.¹²⁵ The measure of damages for compensation is "actual loss which the acts or omissions have caused."¹²⁶ Thus, there are two requirements to trigger liability for compensation: that the breach of the duty *caused* the loss and that the attorney is personally *liable* for the breach (that is, the loss was not caused by another attorney's unexcused breach).¹²⁷

The interest here is to promote sound management of property. Thus, the issues that arise under this form of liability arise in exactly the same way under the management of a conventional trust. However, whereas a trustee looks to the trust settlement itself and to the terms of the *Trustee Act* as retained or ousted, the attorney looks to the provisions of the *Substitute Decisions Act* as adjusted by the terms of the continuing power of attorney. Similarly, a guardian looks to the provisions of the *Substitute Decisions Act* as adjusted by the terms of the court's order appointing the guardian and to the management plan approved by the court. The action here arises under the *Substitute Decisions Act* and money awards are subject to the normal operation of the *Courts of Justice Act* in relation to interest payable in respect of the damages awarded.

Cases under this head of liability, whether through attorneyship or trusteeship, are normally those that arise on any conventional passing of accounts—for example, whether the attorney correctly identified transactions against which he or she may take compensation.¹²⁸ Again, the law is stable on this point.

C. BREACH OF FIDUCIARY DUTY: THE REMEDIAL GOAL IS RESTITUTION

I have argued that there is a structural parallel between the duty of care and fiduciary duties of a conventionally situated trustee and those of a conventionally situated attorney to an incapable donor. I have suggested, further, that the

125. Thus where the property reverts through resulting trust there is no loss. See *e.g. Re Nesbitt Estate* (2005), 19 R.F.L. (6th) 166 (Ont. Sup. Ct.); *Down Estate v. Racz-Down*, [2009] O.J. No. 5537 (Sup. Ct.) (QL).

126. *Fales*, *supra* note 94 at 320, Dickson J.

127. See *Shibley*, *supra* note 105.

128. See *Bagnall v. Bruckler*, [2009] 179 A.C.W.S. (3d) 1195 (Ont. Sup. Ct.).

attorney's fiduciary obligations exceed those of a trustee, given the special vulnerabilities of the incapable donor. Somewhere in this general area, one should properly add the attorney under a not-necessarily-continuing but general power of attorney to a capable donor who is so frail and vulnerable that the law takes special account of him or her and protects against misconduct by the attorney. There is of course a difference—the attorney to the incapable donor has specific positive obligations to act and can be compelled by the court to act (though one would expect that the preferable course would be for a court to appoint a guardian to displace the attorney acting under the power). For the purposes of remedial response to a breach of each of these attorney's fiduciary obligations, the position largely remains the same. Grossly offensive conduct, such as acting faithlessly toward a very vulnerable person, should be met with a strong response as a matter of principle.

Given the parallel with the structure of trusteeship, it is not necessary for me to review the many ways that equity can act against the equitable wrongdoer, which include personal money awards for compensation,¹²⁹ proprietary relief of many kinds, tracing the property into the hands of a third party, or perhaps even identifying a third party accessory to the wrong who might also be held liable. There are many variations on the same theme. The court uses the remedial devices at its disposal flexibly to put the wronged party in as good a position as he or she would have been had the breach not occurred¹³⁰ and also to strip the wrongdoer of any gains arising from the wrong.

I would suggest, perhaps, one augmentation. A beneficiary is entitled to claim property from the trustee and to compel the trustee to restore the beneficiary to the position that he or she would have enjoyed but for the trustee's breach of fiduciary duties. This is an expansive form of liability that seeks to take account of the type of wrongful conduct (a breach of fiduciary duty rather than a breach of the duty of care) and make remedies available to deter such conduct. The court should not lightly excuse offensive conduct, even if the settlor made generous allowance for misbehaviour.¹³¹ Courts should turn their minds to the

129. For more on equitable compensation, see *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142 at para. 84. See also *Canson*, *supra* note 114 at para. 93, Stevenson J., approving in dissent.

130. See *Hodgkinson*, *supra* note 67.

131. For example, there is a great reluctance to give effect to exculpatory clauses in respect of gross negligence. See *Armitage*, *supra* note 93. Cf. *Caponi v. Canada Life Assurance Co.* (2009), 72 C.P.C. (6th) 331 (Ont. Sup. Ct.).

appropriateness of awarding compound rather than simple interest on legal or actual rates so as to best restore the donor to the position that he or she could have occupied. The normal rule, of course, does not favour compound interest.¹³² But in matters such as these, where an attorney has breached a fiduciary obligation and equity could otherwise use proprietary and personal remedies to like effect, it is possible.¹³³ Thus, in *Bank of America Canada v. Mutual Trust Co.*,¹³⁴ Justice Major held:

Equity has been recognized as one right by which interest may be awarded other than as specifically stated in ss. 128 and 129 *CJA*, including an award of compound interest. ... It is of some interest that in *Air Canada v. Ontario (Liquor Control Board)*, [1997] 2 S.C.R. 581 (S.C.C.), at para. 85... Iacobucci J. emphasized that in equity the awarding of compound interest is a discretionary matter. Simple breach of contract does not require moral sanction and is usually governed by common law, not equity.

In this case, the Court of Appeal recognized that the court has the jurisdiction to award compound interest under the court's general equitable jurisdiction and that an award of compound interest grounded in equity is, in the language of ss. 128(4)(g) and 129(5), "payable by a right other than under this section."¹³⁵

Compound interest on money awards for a breach of a continuing attorney's fiduciary duty should be the norm in order to foster a principled view of attorneyship and to deter misfeasance and misappropriation. Certainly, it is open to the court to presume compound interest on money awards in respect of the misappropriation of conventional trust property¹³⁶ and to order compound interest even when it traces misappropriated property into the hands of a third party in "knowing receipt."¹³⁷ The breach of a continuing attorney's fiduciary duty is at least as serious as a breach of a trustee's fiduciary obligations, and the two scenarios ought to be treated similarly for the purposes of this rule.

The recent case of *Zimmerman v. Fenwick*¹³⁸ provides a useful illustration. Here the defendant, Mr. Zimmerman, was a fiduciary to a deceased woman.

132. See *CJA*, *supra* note 122, ss. 128(1), 128(4)(a).

133. See *ibid.*, ss. 128(1), 128(4)(g).

134. [2002] 2 S.C.R. 601 [*Bank of America*]. See also *Claiborne Industries v. The National Bank of Canada* (1989), 69 O.R. (2d) 65 (C.A.); *Brock v. Cole* (1983), 40 O.R. (2d) 97 (C.A.).

135. *Bank of America*, *ibid.* at paras. 41-42.

136. See *Waxman v. Waxman* (2008), 240 O.A.C. 18 at para. 5.

137. See *Peppiatt v. Nicol* (2001), 148 O.A.C. 105 at para. 60.

138. *Zimmerman*, *supra* note 118.

He was both an attorney under a power of attorney and a trustee in respect of her alter ego trust (remainder to charitable beneficiaries). The donor was eighty-one years old, frail, and in ill health when the power was granted. Her capacity was not an issue before the court, and I assume that she was capable until her death, notwithstanding that she was in quite ill health. Shortly after making the power of attorney, the donor moved from her private residence into hospitals or seniors' residences where she stayed until her death four years later. After her death, the estate trustees sought to have Mr. Zimmerman, as attorney/trustee, pass his accounts under both the power of attorney and the trust for the time that he held both offices (he was replaced as trustee after the donor's death). There was protracted litigation in respect of the preparation of the accounts and in respect of objections made by the estate trustees. The accounts as presented by the attorney as trustee were "inadequate, incomplete and in many respects false."¹³⁹ The attorney/trustee failed to account for cash withdrawals, loans he made to himself, and transactions entered into on behalf of the donor and trust. His lack of record-keeping and his failure to respond to reasonable inquiries "frustrated the court's ability to fairly assess his conduct as attorney and trustee."¹⁴⁰ Moreover, he actively obstructed attempts to get an accounting by the estate trustees and beneficiary. Justice Strathy remarked that his conduct was "egregious"¹⁴¹ and held:

Considering that Mrs. McMichael was resident in hospitals and nursing homes during almost the entire period covered by the Trusts, there was an onus on Mr. Zimmerman to explain how these expenses could possibly have been for her benefit or related to his duties in the administration of the Trusts. It is simply impossible to objectively determine whether any of these expenses were legitimate expenses on behalf of Mrs. McMichael or the Trust. Only Mr. Zimmerman is in a position to explain and justify the expenses. It is not sufficient for him to make general statements, such as assurances that he acted with the "utmost rectitude" at all times. He had an obligation to demonstrate that each challenged disbursement was properly made. He made no attempt to do so.¹⁴²

A litany of complaints were brought against the defendant as attorney and trustee. Suffice it to say that Mr. Zimmerman breached his duties thoroughly and fundamentally.

139. *Ibid.* at para. 38.

140. *Ibid.* at para. 40.

141. *Ibid.* at para. 49.

142. *Ibid.* at para. 40.

One issue was the pre-taking of compensation by the defendant as trustee. Normally, a trustee is not entitled to pre-take compensation. An attorney for an incapable person is, by contrast, entitled to do so under the *Substitute Decisions Act*.¹⁴³ This is a functional rather than a principled distinction: whereas a trustee is entitled to fair and reasonable compensation on the traditional tariff as adjusted by the court,¹⁴⁴ an attorney is entitled to the prescribed rate set out in the Regulation.¹⁴⁵ In neither case can the trustee or attorney merely help himself to the managed funds. Thus, whether one calls it mistaken pre-taking or merely a mistake in management, there is a world of difference between negligence and misappropriation. In this case, a defence was advanced, and rejected, that the attorney's misconduct could more properly be seen as a breach of the duty of care (improperly but honestly pre-taking compensation) rather than a breach of fiduciary duty (misappropriating property of the donor). Justice Strathy held:

In this case, the trust deed impliedly permitted pre-taking. It stated:

Any of the Trustees may take and be paid out of the Trust Fund or the income there from or both in such proportions as the Trustees see fit such compensation as is reasonable having regard to the size of the Trust Fund and the time and effort expended by him or her in connection with the administration of the trusts herein contained.

The authority to pre-take compensation did not relieve Mr. Zimmerman of the responsibility to ensure that the pre-taking was reasonable, and this required that a reasonable calculation be made and that a record of the taking and the calculation be preserved. In the absence of such a record, the court and the beneficiaries have no way of distinguishing between a taking of compensation, a loan or a defalcation.

...

Mr. Zimmerman failed to keep any record of his pre-takings of compensation, although he was required to do so by the SDA in relation to the Power of Attorney. There is no record whatsoever of his calculations of the compensation to which he was entitled. There is no evidence at all that he ever communicated with the beneficiaries of the Trust, or with any of the professional advisors, to explain that he was pre-taking compensation or the basis on which it was being calculated. Although he suggested at one point in his evidence that he was taking compensation quarterly, the evidence does not bear this out.

143. *Supra* note 1, s. 40(1).

144. *Trustee Act*, *supra* note 82, s. 61. See *Laing Estate v. Hines* (1998), 41 O.R. (3d) 571 (C.A.).

145. O. Reg. 159/00, s. 1.

I accept that somewhere in the back of his mind Mr. Zimmerman knew that he was entitled to compensation as a trustee and he may even have made some sort of rough and ready calculation of his entitlement. If that is what he was doing, the onus was on him to ensure that his takings were reasonable and appropriate in all the circumstances. The onus was also on him to ensure that his takings were open and documented. He did none of these things.¹⁴⁶

It was clear, then, that the defendant, as trustee and attorney, acted improperly by any standard. What is puzzling about *Zimmerman*, and other decisions like it,¹⁴⁷ is the remedy:

I come to these conclusions on the undisputed evidence and on the basis of Mr. Zimmerman's own admissions. In light of these conclusions, Mr. Zimmerman is entitled to no compensation for his services as attorney and trustee.

Mr. Zimmerman will be required to repay the amounts that he has pre-taken by way of compensation, in the total amount of C\$356,462.50 and US\$85,400.00, together with pre-judgment interest from the date of each taking.

For the reasons given, Mr. Zimmerman shall repay the sum of \$34,064.55 paid to Reynolds Accounting Services for the preparation of accounts.

Mr. Zimmerman must also reimburse the Trust for \$2,000.00, being the value of the missing Lismar sketch.¹⁴⁸

It seems clear in this case that no matter how the fiduciary duty was constructed (that is, as attorney or as trustee), the defendant breached not merely the duty of care but also his fiduciary duties. He took money for his own benefit in sums that could not be considered reasonable, kept few records, frustrated all attempts at accounting, and was ultimately denied compensation. Given that the proceedings may not have yet terminated at trial, perhaps I have misconstrued the state of the litigation. However, assuming for the sake of argument that my apprehension of the facts is accurate, one would think a remedy that reflected the seriousness of the breach was consistent with an award of compound interest based on actual or the legal rates, whichever is higher.

146. *Zimmerman*, *supra* note 118 at paras. 76-86.

147. See also *Volchuk Estate v. Kotsis*, [2007] 159 A.C.W.S. (3d) 157 (Ont. Sup. Ct.); *Jacobs Estate v. Hershorn*, [2006] 23 E.T.R. (3d) 308 (Ont. Sup. Ct.); *Fareed*, *supra* note 54; and *Re York Estate*, (7 August 1998) 086/93 Toronto (Ct. J. (Gen. Div.)).

148. *Supra* note 118 at paras. 114-17.

D. THE PROBLEM OF THE SELF-INTERESTED ATTORNEY

In the last fifty years or so in Canada, England, Australia, and elsewhere, the nature of the constructive trust has been closely examined. Such a trust was said to have operated, in traditional terms, either “institutionally” or “remedially.” Institutionally meant, for example, that some exceptional trusts could be fully constituted by the court on the basis that the settlor did everything he or she could have done to perfect the trust, but there was still a failure to vest in circumstances where that the failure was not attributable to the settlor. Hence the court could “perfect the imperfect gift” through a constructive trust institutionally and without reliance on judicial discretion.¹⁴⁹ The remedial constructive trust (or other forms of proprietary relief in equity) is much more contentious—remedy for what? The utility and significance of the development of the law of unjust enrichment becomes immediately apparent: it could provide an explanation for why a mistaken payment might yield a restitutionary rather than a compensatory remedy¹⁵⁰ or why *quantum meruit* arises in autonomous unjust enrichment based on the reasonable expectations of the parties.¹⁵¹

Those who take an expansive view of unjust enrichment take a correspondingly narrow view of equity and its traditional soft standard of “conscience”;¹⁵² spirited defences of equity and conscience as creative devices are not meant for them.¹⁵³ The conscience standard in equity masks discretionary decision making and sloppy thinking (“palm-tree justice”) and ought to yield to the quasi-scientific

149. See *Rose v. Island Revenue Commissioners*, [1952] 1 All E.R. 1217 (C.A.).

150. See *Chase Manhattan Bank N.A. v. Israel-British Bank (London) Ltd.* (1976), [1981] Ch. 105.

151. I have considered the question in some detail elsewhere. See C.D. Freedman, “Unjust Enrichment Claims Against the Estate Based on the Provision of Services to the Deceased” (2009) 29 E.T.P.J. 163.

152. See e.g. Peter Birks, “Equity in the Modern Law: An Exercise in Taxonomy” (1996) 26 U.W.A.L. Rev. 1; Peter Birks, “Annual Miegunyah Lecture: Equity, Conscience and Unjust Enrichment” (1999) 23 Melbourne U.L. Rev. 1.

153. See Lord Neuberger MR, “Has Equity Had Its Day?” (Common Law Lecture, delivered at the Faculty of Law, Hong Kong University, 12 October 2010), online: <<http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/mr-speech-hong-kong-lecture-12102010.pdf>>. See also Sir Anthony Mason, “Themes and Prospects” in P.D. Finn, ed., *Essays in Equity* (Sydney: The Law Book Co. Ltd., 1985) 242; Sir Anthony Mason, “Equity’s Role in the Twentieth Century” (1997) 8 King’s College L.J. 1; and Lord Justice Millett, “Equity—The Road Ahead” (1995) 6 King’s College L.J. 1.

approach of unjust enrichment. Some commentators, like Peter Birks, argue for a more civilian approach to equity and a categorization of juristic reasons or unjust factors that might justify an enrichment staying with or returning to one party or another.¹⁵⁴ Certainly a remedy for a legal wrong like fraud (deceit) was one factor that might justify proprietary relief, whereas this result was less certain in the case of equitable fraud. Canadian courts accepted a middle ground—saying yes to unjust enrichment and an autonomous action in unjust enrichment and also saying yes to traditional equity.¹⁵⁵ I would suggest that the pragmatic Canadian approach preserves equity as important and flexible, but the approach simultaneously allows for greater precision in how the court may act where there is no traditional wrong or doctrine to explain why an enrichment and corresponding deprivation is suspicious and might yield to an order restoring the status quo.

Thus far in this article, I have discussed the obligations of an attorney under a continuing power of attorney acting for an incapable donor. I have also remarked upon both the attorney's duty of care and his or her extensive fiduciary obligations owed to the donor. Liability in these circumstances does not arise in autonomous unjust enrichment; rather, liability arises under the *Substitute Decisions Act* or in equity, as appropriate to the circumstances. There must be a wrong that drives liability. At one extreme of attorney liability (breach of the duty of care), liability may be excused—there is a statutory defence and a very good public policy reason to forgive the honest and reasonable attorney from liability. At the other extreme (egregious breach of fiduciary duty), liability is never excused, and the remedial response is robust. The question that remains to be confronted is this: how expansive can the remedial response be to this sort of wrongful conduct? Can it go so far as to disturb proprietary entitlements of a very particular kind, such as those that arise as a matter of inheritance? I suggest that the answer is yes and that the court has jurisdiction to use a constructive trust to, in essence, order that the attorney is incapable of inheriting from the wronged donor either to the extent of the wrong or, perhaps, at all. This should not be an automatic response. I suggest merely that we recognize that if attorneyship is to be fostered as a legal institution, we must ensure that egregious wrongs do not go unremedied

154. Birks, *supra* note 152.

155. See *Garland v. Consumers' Gas*, [2004] 1 S.C.R. 629 [*Garland*]. Interestingly, treatment of a problem can move from one category into the other; cf. *Kerr v. Baranow* (2011), 328 D.L.R. (4th) 577 (S.C.C.), abandoning resulting trust for treatment in unjust enrichment.

and that wrongdoers are not allowed to profit, even indirectly, from their wrongs. This is true for both misfeasance and nonfeasance.

Consider the following scenario. An older adult gives a continuing power of attorney for management of his or her property to an adult child. The donor's will leaves his or her estate to the children equally. The attorney accepts the appointment and, under the donor's direction, the attorney uses the power while the donor remains capable. Under these circumstances, the attorney is the agent of the donor. The donor is later diagnosed with dementia and is incapable of managing his or her property. The *Substitute Decisions Act* is now fully engaged, and the obligations owed by the attorney to the donor are extensive: the attorney is a fiduciary of the highest order. When left unsupervised by the donor, the attorney acts badly—perhaps he or she misappropriates property or merely omits to do anything at all. As a result, the donor is denied the use of his or her funds. Perhaps the effect of this lost opportunity is not keenly felt in the circumstances of this particular donor. Alternatively, it is all too keenly felt—those who are familiar with the variability in quality of available long-term care facilities and personal care assistance will instantly appreciate the differences that might arise between an incapable donor with assets and one without. In any case, in this way the attorney is able to take an advance on his or her expected inheritance or preserve the assets of the donor to enhance his or her expected future share of the estate, or both.

Aside from the possibility of stanching the bleeding through the appointment of a guardian while the donor remains alive, one would think, based on the foregoing discussion, that the proper course would be an action against the attorney for breach of the duty of care and breach of fiduciary duty. However the matter is brought before the court, and in whatever form, what should be the proper remedial response? Obviously a money award is one such response, but at first blush it would seem that whatever remedy is ordered may well prove ineffective. If the order is made *inter vivos*, and assuming that the donor dies with assets and that the estate is solvent, the attorney is, in effect, merely forced to pay money into a sort of escrow to be claimed in some remaining part later as a gift due to him or her under the will. If the money is paid to the donor's estate after his or her death, the attorney seems to transfer the money from one pocket to another. Such a result is inadequate.

To my mind, the resolution of the lacuna set out above relies upon the law fostering the integrity of attorneyship through appropriate standards of conduct

and effective remedies to respond to improper conduct, both negligent and fraudulent in character. If necessary, and with some trepidation, I suggest that in appropriate cases the court should retain equitable discretion to respond to an egregious case of fiduciary wrongdoing by disturbing the entitlements due to him or her in the donor's will or that would run in his or her favour through the intestacy rules. What, then, should the result be? The attorney should have to provide compensation with compound interest to the estate unless the donor or his or her estate might be better off by claiming a proprietary remedy against property into which the misappropriated money can be followed or traced. This has the effect of both restoring the donor's interest and forcing the attorney to disgorge any gain. Thereafter, I would suggest that the trustee should be held incapable of inheriting any share of the estate up to the amount awarded against the attorney; that is, the attorney should be a constructive trustee in favour of innocent heirs to that amount. If appropriate, as in the case of nonfeasance that produces a difficulty in quantifying the harm, the court ought to presume complete inability to inherit. Additionally, the attorney should have the onus of rebutting that presumption and establishing a quantum that the court might in good conscience (as a "Court of Conscience," to use the ancient phrase) allow the attorney to retain. I will endeavour to explain why I suggest that this solution is appropriate in law and on policy grounds.

In a case concerning the extent of liability for the equitable wrong of a breach of confidence, Lord Goff stated, "The statement that a man shall not be allowed to profit from his own wrong is in very general terms, and does not of itself provide any sure guidance to the solution of a problem in any particular case."¹⁵⁶ Lord Goff's point was that equity should not be used in an unpredictable and undisciplined way. While equity may respond creatively within its jurisdiction, "equity acts consistently and in accordance with principle."¹⁵⁷ I suggest that proceeding as I have argued above would be in accordance with the principle that "equity will not suffer a wrong to be without a remedy" and that a remedial constructive trust or other appropriate relief may be ordered to remove the profit from any wrong accruing to the wrongdoer.

Thus, I would suggest that the jurisdiction to disturb proprietary entitlements through proprietary remedies in equity can be understood as follows: first, we

156. *Attorney General v. Guardian Newspapers Ltd. (No. 2)*, [1990] 1 A.C. 109 at 268 (H.L. (Eng.)).

157. *Muchinski v. Dodds* (1985), 160 C.L.R. 583 at para. 7, Deane J. (H.C.A.).

look to the nature of the wrong to discover whether the harm is sufficiently significant to allow for such a powerful remedy to be ordered; and second, we consider whether the remedy is appropriate in the circumstances of the case—that is, would there be unintended and deleterious effects on third parties that might otherwise have equally good, or superior, claims against the property to be made subject of the order. Thus, as Justice McLachlin said in *Soulos v. Korontzilas*, a constructive trust might arise in response to an equitable wrong in the form of a breach of fiduciary duty as a matter of orthodoxy:

The constructive trust imposed for breach of fiduciary relationship thus serves not only to do the justice between the parties that good conscience requires, but to hold fiduciaries and people in positions of trust to the high standards of trust and probity that commercial and other social institutions require if they are to function effectively.

It thus emerges that a constructive trust may be imposed where good conscience so requires. The inquiry into good conscience is informed by the situations where constructive trusts have been recognized in the past. It is also informed by the dual reasons for which constructive trusts have traditionally been imposed: to do justice between the parties and to maintain the integrity of institutions dependent on trust-like relationships. Finally, it is informed by the absence of an indication that a constructive trust would have an unfair or unjust effect on the defendant or third parties, matters which equity has always taken into account. Equitable remedies are flexible; their award is based on what is just in all the circumstances of the case.

Good conscience as a common concept unifying the various instances in which a constructive trust may be found has the disadvantage of being very general. But any concept capable of embracing the diverse circumstances in which a constructive trust may be imposed must, of necessity, be general. Particularity is found in the situations in which judges in the past have found constructive trusts. A judge faced with a claim for a constructive trust will have regard not merely to what might seem “fair” in a general sense, but to other situations where courts have found a constructive trust. The goal is but a reasoned, incremental development of the law on a case-by-case basis.¹⁵⁸

I would suggest that the institution of attorneyship is socially significant, depends on high standards of trust and probity, and requires, as a matter of good conscience, that attorneys be prevented from profiting from wrongs, either directly or indirectly. It is the very best example of a circumstance in which wrongdoing might be properly addressed through the imposition of a constructive trust.

What, then, of the testamentary context? On the one hand, we need not be concerned with how third parties like creditors might be affected if we recognize

158. [1997] 2 S.C.R. 217 at paras. 33-35.

that it is only the *attorney's* inheritable share that is at issue. That is, the question arises only if the estate is solvent and creditors' claims have been satisfied. Thus, if the attorney restores the estate to the position in which it should have been on the donor's death and third-party creditors have a superior claim to the assets of the estate, the question of disturbing the attorney's inheritance never arises. The solution works well, as third parties may now look to the restored assets to satisfy their claims and the wrongdoer no longer profits from his or her wrong.

We are still left with the converse situation: the estate is solvent and the attorney is in a position to recoup, in whole or in part, the money restored. If he or she pays to the estate and there is an equal division between his or her siblings and him or herself, then he or she is allowed to retain his or her share of the proceeds paid. While this does not allow the attorney to profit from the wrong, it certainly provides a discount to the award and provides no deterrence to other wrongdoers. Obviously, we are not dealing with criminal punishment, but it is important to foster the integrity of attorneyship: wrongful conduct must be deterred, particularly fiduciary wrongs in respect of highly vulnerable people.

The law does not interfere easily with proprietary entitlements flowing from a testamentary instrument any more than it disturbs proprietary entitlements in other contexts.¹⁵⁹ In the testamentary context, there is, however, jurisdiction based on the conduct of the heir both at common law and under the *Quebec Civil Code*.¹⁶⁰

There is long-standing, but somewhat uncertain, jurisprudence¹⁶¹ not to allow

159. Indeed, I would suggest that context is everything here. For a discussion of the context of commercial partnerships, see *Olson v. Gullo* (1994), 17 O.R. (3d) 790 (C.A.).

160. Art. 621(1) C.C.Q. It states, "The following persons may be declared unworthy of inheriting ... a person guilty of cruelty towards the deceased or having otherwise behaved towards him in a seriously reprehensible manner." See also *Piché c. Fournier*, [2010] R.J.Q. 455 (C.A.) [*Piché*]. *Piché* establishes that such conduct includes non-criminal conduct such as fraud and abuse of the deceased—"it covers a broader scope than that of the commission of a crime" (at para. 26) [translated by author]. The offensive conduct must either be intentional or voluntary. Thus, a successful defence of not criminally responsible to a murder charge may allow the murderer to inherit.

161. See e.g. *Demeter v. Dominion Life Assurance Co.* (1982), 35 O.R. (2d) 560 (C.A.); *Cleaver v. Mutual Reserve Fund Life Association*, [1892] 1 Q.B. 147 (C.A.(U.K.)); *Houghton v. Houghton*, [1915] 2 Ch. 173; *Re Gore* [1972] 1 O.R. 550 (H.C.J.); *R. v. National Insurance Commissioner*, [1981] 1 All E.R. 769 (Q.B.); and *Dunbar v. Plant*, [1998] Ch. 412 (C.A.). See The Law Commission, *The Forfeiture Rule and the Law of Succession: A Consultation Paper* (London: Law Commission, 2003); Tasmania Law Reform Institute, *The Forfeiture Rule* (Issues Paper No. 5) (Tasmania Law Reform Institute, 2003); Timothy Youdan, "Acquisition of Property by Killing" (1973) 89 Law Q. Rev. 235; and Andrew Hemming, "Killing the Goose and Keeping the Golden Nest Egg" (2008) 8 L. & Just. J. 342.

those who unlawfully cause the death of another to inherit from the deceased's estate, receive insurance proceeds on the life of the victim, or take property under the doctrine of survivorship in respect of joint tenancies. In *Brisette Estate v. Westbury Life Insurance Co.*,¹⁶² the insurer sought to avoid payment under a life insurance policy where a husband murdered his wife. As the designated beneficiary of the proceeds, the husband renounced his claim in favour of her estate and then sought to have the proceeds of the policy paid into the estate.

The issue in *Brisette Estate* was whether the insurance policy should be enforced and, if so, whether a constructive trust might arise against the murderer. For the majority of the Supreme Court of Canada, Justice Sopinka denied the claim on both bases. The contract of insurance contemplated that the husband would benefit but he could not do so based on the traditional rule that one who murders the insured cannot claim insurance proceeds on the victim's life. The dissenters, Justices Gonthier and Cory, would not allow the murderer to inherit but were of the opinion that the contract should be enforced narrowly in favour of innocent heirs; otherwise the insurer would seem to gain inappropriately. Justice Sopinka held:

In order to determine whether, as a matter of public policy, the Court should resort to the device of a constructive trust, it is appropriate to consider whether the application of public policy which denies payment to the felonious beneficiary would work an injustice if recovery is denied to the appellants. After all, it is this policy that prevents the contract from taking effect in accordance with its terms. If denial of recovery by the estate is not inconsistent with this policy, then there is no misuse of public policy which would warrant a conclusion that its application is unjust.

...

The rationale of the policy which denies recovery to the felonious beneficiary is that a person should not profit from his or her own criminal act.

...

But, even if I had concluded that the denial of recovery to the estate was inconsistent with public policy, in my opinion it would be contrary to established principles of equity to employ a constructive trust in this case. A constructive trust will ordinarily be imposed on property in the hands of a wrongdoer to prevent him or her from being unjustly enriched by profiting from his or her own wrongful conduct. For example, in *Schobelt v. Barber*, [1967] 1 O.R. 349 (H.C.), the court imposed a constructive trust on property which passed to a joint tenant who had murdered his co-tenant. By virtue of the instrument creating the joint tenancy the surviving tenant acceded to the whole property. In order to prevent the wrongdoer from being unjustly enriched, the whole property was impressed with a constructive trust with the estate of the deceased joint tenant as beneficiary of one-half of the property.

162. [1992] 3 S.C.R. 87 [*Brisette Estate*]. See also *Re Dreger* (1976), 12 O.R. (2d) 371 (H.C.).

The requirement of unjust enrichment is fundamental to the use of a constructive trust.

...

In this case, no claim of unjust enrichment has been made out. It cannot be said that but for Gerald's act, Mary's estate would have recovered the money. The wrongdoer does not benefit from his own wrong, nor is the insurer in breach of its duty to Mary. It is simply complying with the express terms of the contract. Moreover, there is no property in the hands of the wrongdoer upon which a trust can be fastened. By virtue of public policy the provision for payment in the insurance policy is unenforceable and no money is payable to the wrongdoer. The effect of a constructive trust would be to first require payment to the wrongdoer and then impress the money with a trust in favour of the estate.¹⁶³

Thus, a constructive trust can arise in testamentary circumstances in relation to unjust enrichment, which, in the majority's view, did not occur on the facts of the case before the Court.

Brisette Estate arose before the authoritative recognition of autonomous unjust enrichment as an action in *Garland v. Consumers' Gas*.¹⁶⁴ Today, we would approach the matter as follows: if the contract, will, or other instrument is effective to convey the interest, then autonomous unjust enrichment does not arise; there is a traditional juristic reason for the gain. Of course, the law may hold the instrument (like the insurance contract)¹⁶⁵ to be ineffective where, say, the beneficiary murders the insured. Given that we do not conceive of unjust enrichment any more than equity in general as a vehicle to promote discretionary decision making at large (*unjust* enrichment relates to absence of juristic reason, not "justice"), then one returns to the wrong itself and its remedy. This allows for principled and controlled evolution of doctrine within the area of law giving rise to the wrong substantively, rather than removing the matter to unjust enrichment at large for resolution.

163. *Brisette Estate*, *ibid.* at paras. 7-16.

164. *Supra* note 155. See also *Oldfield v. Transamerica Life Insurance Co. of Canada*, [2002] S.C.R. 742 at paras. 24-28. In this case, the insured died while committing an illegal act that was the cause of death (smuggling cocaine-filled condoms in his stomach that burst). The insurer sought to avoid paying the proceeds under the contract of insurance on the insured's life. In considering the extent of the forfeiture principle as set out in *Brisette Estate*, *ibid.*, the Court held that the principle does not extend so far as to prevent the proceeds being paid to an innocent beneficiary where the insured did not intentionally cause the loss insured against. That is, innocent beneficiaries are not affected by the public policy that a person ought not to be able to insure against his or her own criminal act and thus profit from a wrong.

165. *Cf. Richardson Estate*; *supra* note 3.

Thus, we return to equity and policy in respect of equitable wrongs. Having argued that a constructive trust is available as a remedy to force restoration, make restitution, and prevent the wrongdoer profiting from his or her wrong, it is only necessary to determine how such an investigation might be structured in the facts of a given case. I would suggest that the method I have proposed helps to treat the case of the attorney who does nothing at all in the face of the donor's need as well as the case of the attorney who misappropriates. Both interfere with the donor's lost opportunity to have the benefit of his or her assets in a way that is much more than merely a question of the value of the assets. If the donor was alive, of course, we could (in theory) intervene to order that the attorney personally perform the obligations. One would think that such a faithless and neglectful attorney would be an unsuitable person and should be replaced by a guardian; indeed, we might say that the attorney should give way to the guardian and ought to suffer in costs in any proceedings that arise unnecessarily in respect of the appointment of a guardian in succession.¹⁶⁶ The preferable approach is to reverse the onus and put the attorney to the task of showing that the court in good conscience should allow him or her to take of the inheritance that would otherwise accrue to him or her. Such a method speaks both to the nature of the wrong and to the court's equitable jurisdiction and puts the onus of quantification of the appropriate money award on the wrongdoer, rather than on the donor's estate or innocent heirs. This seems an appropriate result in principle and would work pragmatically as well.

IV. CONCLUSION

Powers of attorney set up an agency in traditional practice. Under the regime created by the *Substitute Decisions Act*, attorneyship under a continuing power of attorney in respect of an incapable donor means much more. For this important institution to evolve properly, the law must develop and foster a principled approach to both attorney liability and the remedial response to such liability.

166. It seems quite apparent that the trend is to not encourage litigation on powers of attorney or in respect of guardianships for either property or personal care and to use the costs rules to deter litigation. See e.g. *Bosch*, *supra* note 101; *Chu*, *supra* note 101; *Bennett*, *supra* note 100; *Bailey v. Bailey* (2009), 55 E.T.R. (3d) 198 (Ont. Sup. Ct. J.); *Fiacco*, *supra* note 104; and *Teffer*, *supra* note 60.

One must distinguish between the duty of care and the extensive fiduciary obligations owed to the donor. Upon breach, compensation follows the former, and restoration and restitution follow the latter. Where appropriate, and in extreme cases, courts of equitable jurisdiction should use the full range of equitable proprietary remedies to ensure that an attorney who breaches his or her fiduciary duties does not profit from the wrong directly or indirectly, even to the extent of disturbing inheritable interests in the donor's estate by the attorney. This should not be an automatic response. Rather, if we recognize that attorneyship is to be fostered as a vital legal institution, we must ensure that egregious wrongs do not go unremedied and that wrongdoers are not allowed to profit, even indirectly, from their wrongs.